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and all others similarly situated

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL PEMBERTON and
SANDRA COLLINS-PEMBERTON,
individually, and on behalf of the class
of all others similarly situated,

Plaintiff,

vs.

NATIONSTAR MORTGAGE LLC, a
Federal Savings Bank,

Defendant.

Case No. 3:14-cv-01024-BAS-MSB

**PLAINTIFFS' MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT;
DECLARATIONS OF DAVID J.
VENDLER, MICHAEL R. BROWN
(FILED IN SUPPORT OF THE
SEPARATE MOTION FOR
ATTORNEY'S FEES)
DECLARATIONS OF JENNIFER
M. KEOUGH AND THEA CROSS
RE CLASS NOTICE AND CLASS
PARTICIPATION**

[filed concurrently with plaintiffs'
separate motion for attorneys' fees and
class representative enhancement
awards and the Declarations of David J.
Vendler and Michael R. Brown]

Date: January 13, 2020
Time: 11:00 AM
Crtrm.: 4B
Judge: Hon. Cynthia Bashant
Action Filed: April 23, 2014

1 **TO THE COURT, DEFENDANT AND ALL COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on January 13, 2019 at 11:00 a.m. or as
 3 soon thereafter as the matter may be heard before the Honorable Cynthia Bashant in
 4 Courtroom 4B of the United States District Court, Southern District of California,
 5 333 W Broadway, San Diego, CA 92101, plaintiffs Michael and Sandra Collins-
 6 Pemberton (“plaintiffs” or “Named Plaintiffs”) will and hereby do move, pursuant to
 7 Federal Rule of Civil Procedure 23(e), for an order: (a) determining that the
 8 Settlement¹ previously preliminarily approved by the Court is fair, reasonable, and
 9 adequate and (b) entering the order and judgment finally approving the Settlement
 10 submitted herewith. (A separately filed motion will seek the Court’s approval for
 11 Class Counsel’s attorneys’ fees and the approval of an enhancement award to the
 12 Named Plaintiffs).

13 The motion is made on the grounds that: (1) the Class Notice has been
 14 effectuated as previously ordered; (2) the Class Notice fairly apprised Class
 15 Members of the terms of the Settlement, including the amount that would be
 16 requested for attorneys’ fees and for the Named Plaintiffs’ enhancement award; (3)
 17 the time for receiving claims/exclusions has passed², as previously ordered in the
 18 Court’s October 9, 2019 “ORDER: (1) PRELIMINARILY APPROVING CLASS
 19 ACTION SETTLEMENT; (2) CONDITIONALLY APPROVING PROPOSED
 20

21 ¹ Capitalized terms, where used herein, have the same meanings as in the parties’
 22 full settlement agreement that is attached as Exhibit 1 to the Declaration of David J.
 23 Vender (“Vender Decl.”) filed in support of plaintiffs’ motion for preliminary
 24 approval. See ECF No. 130-1. That declaration is also incorporated herein insofar as
 it describes the history of the litigation and its settlement.

25 ² The time for objections will not have passed as of the deadline for the filing of this
 26 motion. As of the filing date, there have been no objections filed to the Settlement.
 27 A supplemental declaration from the class administrator will be filed after the
 28 December 30, 2019 objection deadline but prior to the January 13, 2020 final
 approval motion hearing date letting the Court know what, if any, objections were
 filed prior to December 30 as well as final statistics on class participation.

1 SETTLEMENT CLASS; AND (3) SETTING HEARING OF FINAL APPROVAL
 2 OF SETTLEMENT” (ECF No. 131) (hereinafter “Preliminary Approval Order”)
 3 (ECF No. 131); (4) all requirements for certification of a class action solely for
 4 settlement purposes are met (as found in the Court’s Preliminary Approval Order);
 5 (5) the Settlement is in the best interest of Class Members; and (6) the Named
 6 Plaintiffs’ attorneys are experienced in complex litigation and have zealously and
 7 adequately represented the interests of Class Members in a non-collusive manner.

8 This motion is based upon: (1) this notice of the motion; (2) the memorandum
 9 in support of the motion; (3) the Declarations of: Thea Cross (“Cross Decl.”),
 10 Jennifer M. Keough (Keough Decl.) as well as those of David J. Vendler (“Vendler
 11 Decl.”) and Michael R. Brown (“Brown Decl.”) which are filed as part of plaintiffs’
 12 concurrently filed motion for attorneys’ fees and Named Plaintiff enhancement
 13 award; (3) the pleading and papers previously filed with the Court; (4) the oral
 14 arguments of counsel; and (5) such additional matter as the Court may consider,
 15 including any opposition to any objections of class members. Additionally, as
 16 noted, a supplemental declaration of Ms. Keough will be filed after the close of the
 17 objection period which will provide the final statistics relating to the participation of
 18 the class and any objections thereto.

19 Dated: December 16, 2019

Respectfully submitted,

20 LAW OFFICE OF DAVID J. VENDLER

21 */s/ David J. Vendler*

22

David J. Vendler, Esq.

23 MICHAEL R. BROWN, APC

24 */s/ Michael R. Brown*

25

Attorneys for Named Plaintiffs

26 MICHAEL AND SANDRA COLLINS-
 27 PEMBERTON, and all others similarly
 28 situated

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As this Court is well aware, this case involves allegations that plaintiffs and Class Members suffered damages by virtue of Nationstar’s incorrectly under-reporting the amount of mortgage interest they paid on IRS Forms 1098. Forms 1098 are sent to mortgagees by lenders or mortgage servicers (such as defendant Nationstar Mortgage, LLC (“Nationstar” or “defendant”)) pursuant to 26 U.S.C. § 6050H (“6050H”). Forms 1098 are relied on by home-owners, their tax preparers, and the IRS to determine the amount of mortgage interest that can be deducted from the mortgagee’s income during a given year.

Plaintiffs contended in this suit that 6050H’s terms are straightforward and unambiguous; it requires recipients of “interest”³ on “any mortgage” to report to both the IRS and to the mortgagee on Form 1098 the amount of “interest” the recipient has “received” from the mortgagee during the “calendar year” (if that amount over \$600). The statute does not contain any exceptions, exclusions, or other qualifying language that would exclude particular kinds of “interest” or any particular type of mortgage from its reporting requirement.⁴

As noted in the Court’s Preliminary Approval Order, Nationstar agrees with

³ The Supreme Court has held that the word “interest” in tax statutes is unambiguous and means “the amount which one has contracted to pay for the use of borrowed money.” *Old Colony R. Co. v. Comm’r. of Internal Revenue*, 284 U.S. 552, 560-561 (1932). See also *Deputy v. du Pont*, 308 U.S. 488, 497 (1940)). (The Ninth Circuit also has held that the definition of interest is easy to apply. “Roughly, interest is the rental price of money.” *Wilshire Holding Corporation v. Commissioner*, 262 F.2d 51, 53 (9th Cir. 1958)).

⁴ The pertinent portion of 6050H provides that “Any person— (1) who is engaged in a trade or business, and (2) who, in the course of such trade or business, receives from any individual interest aggregating \$600 or more for any calendar year on any mortgage, shall make the return described in subsection (b) with respect to each individual from whom such interest was received at such time as the Secretary may by regulations prescribe.

1 plaintiffs' main contention that capitalized or deferred interest that is incurred on
2 Pay Option Adjustable Rate Mortgages ("Option ARMS") and which is later paid by
3 the mortgagee is "interest" that *can* be reported by Nationstar on Forms 1098 and
4 which then can deducted by its mortgagees. Where the parties differed in their
5 contentions is whether 6050H *requires* that such interest be reported on Forms 1098.

6 As also noted in the Court's Preliminary Approval Order, while Nationstar's
7 corporate-wide interest reporting policy *is to report payments of capitalized interest*
8 *on Forms 1098*, it admitted in discovery that it did not do so for plaintiffs and the
9 Class Members. Nationstar's "reason" for its having not reported plaintiffs' Class
10 Members' capitalized interest payments was that when it took over certain portfolios
11 of loans, the prior owner/servicer of the mortgage did not include deferred interest
12 amounts in the data it transferred to Nationstar. At the same time, Nationstar
13 admitted that despite its policy for reporting payments of capitalized interest and
14 even though it knew that the portfolios it was acquiring contained Option ARM
15 loans that invariably included such interest, it made absolutely no effort to
16 determine the capitalized interest amounts that were due on those mortgages. Thus,
17 tens of millions of dollars in deductible mortgage interest went unreported and,
18 hence, the mortgagees lost the deductions they could have taken.

19 This Court ultimately sided with Nationstar on whether 6050H *requires* the
20 reporting of mortgagee payments of capitalized interest when it held that 6050H is
21 ambiguous as to "how, whether, and *when*" such interest must be reported on Forms
22 1098. See ECF No. 114 at p. 16 (emphasis original). Although the Named Plaintiffs
23 and their counsel continue to believe that the Court is wrong on all of these
24 findings,⁵ and while they would have certainly continued to challenge these findings

25
26 ⁵ For the record, plaintiffs' contentions on the "how, whether and when" issues are
27 as follows:

28 How – all mortgage interest is to be reported on Forms 1098 (if over \$600);

1 in both this Court and in the Court of Appeal if the case had continued, they
 2 nonetheless were required to face the Court's rulings realistically. The Settlement
 3 was the result of: (1) that realistic evaluation and (2) Nationstar's revelation in
 4 discovery in 2018 that, in 2016, Nationstar had begun reporting the very capitalized
 5 interest payments plaintiffs had been complaining about.

6 Indeed, as noted in the Court's Preliminary Approval Order, *as a direct result*
 7 *of this lawsuit*, Nationstar undertook to try to correct its failure to report Class
 8 Members' deferred interest payments. See ECF No. 131 at p. 7. Indisputably, the
 9 reasons it did so were: (1) that it thought plaintiffs were right in their theory and (2)
 10 Nationstar knew that every year that passed would increase the potential damage
 11 award against it because of the 3-year statute of limitations for amending prior
 12 returns. See 26 U.S.C. § 6511(a). Thus, from 2016 forward, and for some 2,867
 13 loans, Nationstar's corrections resulted in an additional \$50,663,194.44 in
 14 capitalized interest payments being included in corrected Forms 1098 for tax years
 15 2015-2018. See Cross Declaration, ¶ 3. Assuming the same 20% average marginal
 16 tax rate that was used by Judge Curiel in *Horn v. Bank of America, N.A.*, 2014 WL
 17 1455917 *6 (S.D.Cal. 2014), the value to the class from plaintiffs' forcing
 18 Nationstar to implement its fix by their lawsuit was \$10,132,639. This is a concrete
 19 benefit that this case indisputably brought to Class Members. *Id.*

20 This "fix," however, did not moot the plaintiffs' case because it did nothing
 21 for Class Members whose loans had been repaid or transferred to another
 22

23 Whether – 6050H requires reporting of "mortgage interest" and contains no
 24 language of any kind. Capitalized interest is "interest" under the Supreme Court's
 25 definition of "interest," which is money charged for the use of money. See *Old*
Colony and *Deputy*, *supra*.

26 When – On its face, 6050H requires mortgage interest be reported in the calendar
 27 year in which it is paid and no other.

28 Further, plaintiffs contended that since 6050H is unambiguous, there is no need to
 defer to the IRS at all.

1 lender/servicer before Nationstar implemented its “fix.” Also, Nationstar, has
2 conceded that its process for identifying the number of loans that might have paid
3 deferred interest was not foolproof and so at least some Class Members whose loans
4 remained with Nationstar might not have been addressed in its initial “fix.” Cross
5 Declaration, ¶ 3. The Settlement thus attempts to provide some relief to those Class
6 Members who were left out of the 2016 “fix.”

7 **1. Summary of the Settlement**

8 In addition to the \$10,132,639 benefit that the Class has already obtained by
9 Nationstar’s reporting over \$50 million in additional interest to the class as a result
10 of the 2016 “fix,” the Settlement provides that each Class Member who makes a
11 claim and who received an incorrect Form 1098 from Nationstar during the class
12 period will receive, depending on the tax years in which s/he/they paid capitalized
13 interest, (1) amended Forms 1098 (if the Class Member paid the deferred interest in
14 2016 forward), and/or \$50.00 if s/he/they paid capitalized interest prior to 2016.
15 (Class Members can obtain both kinds of relief if s/he/they paid capitalized interest
16 both pre-2016 and post 2016). It is unknown at present the total number of Class
17 Members that will present valid claims by the claims deadline. Nationstar will
18 provide a supplemental declaration attesting to the final class participation numbers
19 and the corresponding benefits provided prior to the final approval hearing.

20 The Settlement also provides that Nationstar will pay: (1) Class Counsel’s
21 attorneys’ fees (up to \$700,000); (2) any enhancement award for the Named
22 Plaintiffs awarded that does not exceed \$10,000 for each Named Plaintiff. (Both of
23 these amounts are sought through Class Counsel’s separate motion for an award of
24 attorneys’ fees).

25 Finally, the Settlement provides that Nationstar will pay all costs of class
26 administration, which are estimated to be approximately \$250,000 after the claims
27 have been fully administered.

28 Because the Settlement is reasonable given the risks inherent in litigation, and

1 is adequate in terms of the relief being afforded to the Class Members, the Named
2 Plaintiffs are seeking through this motion (and their separately filed motion for
3 attorneys' fees): (1) this Court's final approval of the Settlement, (2) that the Court
4 award to Class Counsel fees to be paid by Nationstar in the amount of \$700,000 and
5 (3) that the Court approve an enhancement award in the amount of \$10,000 to each
6 class representative to be paid by Nationstar.

7 **II. PROCEDURAL HISTORY OF THE CASE**

8 Since this Court succinctly set forth the procedural history of this case in its
9 Preliminary Approval Order (ECF No. 131), plaintiffs incorporate here that
10 recitation (and theirs from their motion for preliminary approval of the Settlement)
11 (ECF No. 130). They do, however, want to reemphasize that the Court's ruling
12 denying plaintiffs' motion to supplement/amend their complaint (ECF No. 114) was
13 especially significant to plaintiffs and their counsels' decision to settle, insofar as
14 the Court's determination that 6050H was ambiguous as to "how, whether and
15 *when*" borrower payments of deferred interest must be reported cast substantial
16 doubt as to the continued viability of all of the plaintiffs' claims against Nationstar.
17 See ECF No. 114 at p. 16 (emphasis original). Even though the Named Plaintiffs
18 and their counsel believe that the Court's findings are erroneous, they determined
19 that obtaining some benefit for the class was better than the very real risk of
20 obtaining none if the case were litigated further – a bird in the hand is worth two in
21 the bush, as it were. And, based on rulings related to the pleadings, as well as
22 potential rulings on threatened dispositive motions, Counsel recognized the case
23 would eventually be in the Court of Appeal for many years absent a negotiated
24 settlement. And, as more particularly described below, because of the immovable 3-
25 year statute of limitations for amending tax returns, any further delay in bringing a
26 settlement to the class would inevitably cost Class Members money.

27 ///

28 ///

1 **III. ADEQUATE NOTICE WAS PROVIDED TO THE CLASS AND TO**
 2 **GOVERNMENTAL AGENCIES IN ACCORDANCE WITH THE**
 3 **PRELIMINARY APPROVAL ORDER**

4 As is set forth in the Keough Decl., notice was completed to Class Members
 5 and to governmental agencies (pursuant to CAFA) in the manner set forth in the
 6 Court's Preliminary Approval Order. Thus, Class Members have received the
 7 constitutionally mandated notice required for due process and all affected
 8 governmental agencies have had the opportunity to intervene. None have chosen to
 9 do so. See Keough Decl., generally.

10 **IV. THE BENEFITS OF THE SETTLEMENT TO THE CLASS**
 11 **MEMBERS ARE SUBSTANTIAL AND JUSTIFY FINAL APPROVAL**

12 The Settlement benefits the following Class:

13 All persons who, according to Nationstar's reasonably available
 14 computerized records, had or have Option ARM Loans serviced by
 15 Nationstar and made payments to Nationstar in any tax year from 2010 to
 2018.

16 The Settlement should be approved as reasonable and adequate because the
 17 Settlement, when combined with the 2016 "fix" plaintiffs earlier forced out of
 18 Nationstar, achieves substantially all of the objectives Named Plaintiffs sought in
 19 their complaint and avoids the risks inherent in continued litigation.

20 Indeed, when plaintiffs filed this suit, their goal was not so much to obtain
 21 damages against Nationstar as it was to have Nationstar issue corrected Forms 1098
 22 whereby Class Members could *avoid* being damaged (other than accountancy fees
 23 necessary to amending their tax returns) by having the ability to deduct the full
 24 amount of the mortgage interest they paid. The correction of a systemic problem,
 25 that retroactively cures an error and prospectively puts a proper procedure in place,
 26 benefits all class members. At the time the lawsuit was filed, the value of correcting
 27 this reporting problem was unknown. However, the 2016 "fix" that Nationstar
 28 implemented, (without telling the Court or counsel although it was two years after

1 this action was filed, and which it admits was as a result of this case), accomplished
 2 plaintiffs' primary goal for the overwhelming majority of Class Members. As set
 3 forth in the Cross Declaration, the value of this fix undertaken by Nationstar resulted
 4 in a tax benefit of over \$10 million to Class Members based on the *Horn* formula.

5 For the balance of Class Members who paid capitalized interest during tax
 6 years 2016 forward, and who have made a claim, the Settlement provides them also
 7 with the ability to get their full interest deductions for these years by using the
 8 corrected Form 1098 that will be issued to them pursuant to the Settlement to amend
 9 their prior tax returns for those years.

10 Indeed, the only goals plaintiffs sought in the original complaint that were not
 11 achieved by the Settlement and the 2016 "fix" are as follows: (1) a lack of future
 12 injunctive relief against Nationstar – which does not *now* appear was necessary
 13 since Nationstar's corporate policy had always been to report capitalized interest
 14 payments on Forms 1098); (2) accountancy fees necessary for claimants who were
 15 not included in Nationstar's original "fix" and who paid deferred interest in tax
 16 years post-2016 to amend their tax return; (3) the ability for claimants who paid
 17 deferred interest prior to tax year 2016 to Nationstar who were either (a) not
 18 included in Nationstar's "fix" because they paid or transferred their loans prior to
 19 the "fix" being implemented or (b) who otherwise somehow fell through the cracks
 20 of Nationstar's 2016 search to obtain their full deductions – they will only receive
 21 \$50. While this amount is generally disappointing to Class Counsel, it was a
 22 concession they felt they needed to accept based on (1) the weakened position the
 23 Court's rulings placed plaintiffs in and (2) in order to obtain Nationstar's concurrent
 24 agreement to provide corrected Forms 1098 to class claimants who paid deferred
 25 interest from 2016 forward.

26 **V. ARGUMENT – THE SETTLEMENT IS REASONABLE, ADEQUATE,**
 27 **AND SHOULD BE FINALLY APPROVED**

28 The purpose of this second stage of the class action approval process – the

1 “final approval” hearing – is for the court to finally determine whether the parties
 2 should be allowed to settle the class action pursuant to the terms agreed upon. *Nat'l*
 3 *Rural Telecoms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).

4 The ‘universally applied standard’ in determining whether a court should
 5 grant final approval to a class action settlement is whether the settlement
 6 is ‘fundamentally fair, adequate, and reasonable.’ [Citations omitted]. *Id.*
 7 See also, *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992);
 8 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000); and
 9 *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).
 10 *Id.*

11 The Ninth Circuit has identified the following factors for courts to weigh in
 12 determining whether a proposed class action settlement meets this standard:

- 13 (1) The strength of the plaintiff's case;
- 14 (2) The risk, expense, complexity, and likely duration of further litigation;
- 15 (3) The risk of maintaining class action status throughout the trial;
- 16 (4) The amount offered in settlement;
- 17 (5) The extent of discovery completed and the stage of the proceedings;
- 18 (6) The experience and view of counsel;
- 19 (7) The presence of a governmental participant; and
- 20 (8) The reaction of the Class Members to the proposed settlement.

21 *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir.1998); *Rodriguez v.*
 22 *West Publishing Corp.*, 563 F.3d 948, 963 (9th Cir. 2009) (quoting *Molski v.*
 23 *Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) overruled on other grounds by *Dukes v.*
 24 *Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010)).

25 These factors cannot be applied mechanically; even a single factor
 26 sufficiently favoring settlement may outweigh all the others. *Torrise v. Tucson Elec.*
 27 *Power Co.*, 8 F.3d 1370, 1376 (9th Cir.1993). The over-arching test is whether “the
 28 interests of the class are better served by the settlement than by further litigation.”
Garner v. State Farm Mut. Auto. Ins. Co., 2010 WL 1687832 *8 (N.D.Cal. 2010)
 (quoting Manual for Complex Litig. (Fourth) § 21.61 (2004)).

Thus, “the decision to approve or reject a settlement [under Rule 23(e)] is committed to the sound discretion of the trial Judge.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988). However, this discretion must be exercised bearing in mind the strong policy favoring the compromise and settlement of class actions. *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir.1982); *City of Seattle*, 955 F.2d at 1276; *Garner* at *8; *Curtis–Bauer v. Morgan Stanley & Co.*, 2008 WL 4667090 *4 (N.D.Cal. 2008) (“[T]he court must also be mindful of the Ninth Circuit’s policy favoring settlement, particularly in class action law suits.”)

The fairness of a settlement must be evaluated as a whole, rather than by assessing its individual components. *Hanlon*, 150 F.3d at 1026. Thus, the question is not whether the settlement is perfect, or even whether it could have been better, but is just whether the settlement is within the realm of reasonableness. *Id.* at 1027 and *Garner* *8; and *Fraley v. Facebook, Inc.*, 966 F.Supp.2d 939, 941 (N.D.Cal. 2013). “Settlements are afforded a presumption of fairness if (1) the negotiations occurred at arm’s length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.” *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 445 (E.D. Cal. 2013). Put another way, approval should be granted unless the settlement, “taken as a whole, is so unfair on its face as to preclude judicial approval.” *Republic Nat’l Life Ins. Co. v. Beasley*, 73 F.R.D. 658, 667 (S.D.N.Y. 1977) (citations omitted).

When the above legal standards are applied to the Settlement presently before the Court, final approval is the only reasonable result.

1. The Strength Of The Plaintiffs’ Case Was Much Vitiating By The Court’s Prior Rulings And Plaintiffs Still Faced Much Uncertainty With Respect To Their Remaining Claims

This case was hardly a “slam dunk” for the plaintiffs at the time the Settlement was agreed to. Quite the opposite. Their case could be said to have been

1 hanging by a mere thread. Even at the beginning, their theory for imposing liability
2 against Nationstar was novel and as was ably pointed out in Nationstar's several
3 motions to dismiss, there were many legal hurdles which could have derailed
4 plaintiffs' case.

5 Plaintiffs have already pointed to the significance of the Court's ruling that
6 6050H is ambiguous as to "how, whether and *when*" to report borrower payments of
7 deferred interest. See ECF No. 114 at p. 16 (emphasis original). But there was also
8 a host of other substantive and procedural arguments plaintiffs were going to have to
9 finally prevail upon, including, but hardly limited to: (1) federal
10 preemption/exclusive IRS enforcement jurisdiction, (2) lack of standing; (3) that
11 plaintiffs' claims should be barred by both 26 U.S.C. § 7422 and the Anti-Injunction
12 Act; and (3) that the Pembertons could not state a claim for damages because,
13 pursuant to IRS publication 936, they could have claimed additional amounts of
14 interest than were stated by Nationstar in their Forms 1098.

15 Apart from these potential problems, there were also potential difficulties
16 specific to plaintiffs' several state law and federal claims. Plaintiffs' claim under 26
17 U.S.C. § 6050H was dismissed at the outset because the statute, according to the
18 Court, does not provide for a private cause of action. Plaintiffs' contract-related and
19 fraud claims had also been dismissed. Plaintiffs were thus left with only a
20 negligence claim for damages and a substantially narrowed California UCL claim.

21 There was also always looming over the case, the possibility that the IRS
22 could intervene and/or that it could assert a position in a revenue ruling or regulation
23 that was directly contrary to the plaintiffs' theory. While certainly not binding on
24 the Court, an IRS revenue ruling that 6050H does not require the reporting of
25 capitalized interest would certainly have had a negative impact on the case. This
26 was a real possibility since the IRS has officially put the issue of the reportability of
27 deferred interest on its Priority Guidance List.

28 And then there was also the issue of whether the Court would certify the

1 class. While this Court has found all of the elements necessary to certify a class for
 2 settlement have been met, that determination rests on fewer elements than the
 3 determination of a class for purposes of trial.

4 But even if plaintiffs succeeded on class certification, they were still certainly
 5 going to face a summary judgment motion by Nationstar on (at least) all of the
 6 issues that were raised by Nationstar in the motions to dismiss that it lost on.

7 These are just some of the many hazards that could have derailed plaintiffs'
 8 action entirely, or left it in litigation limbo for years while the issues were sorted by
 9 courts of appeal. Indeed, as the issues in this case are mostly matters of first
 10 impression in the Circuit Courts, with the exception of the *Mikulski v. Centerior*
 11 *Energy Corp.*, 501 F.3d 555, 560 (6th Cir. 2007) case, and since pertinent case law
 12 is relatively sparse, this case would likely have ended up in the Ninth Circuit no
 13 matter which side won at trial.

14 In sum, while litigation is never free of uncertainty,⁶ plaintiffs' position in the
 15 litigation was weak at the time of the Settlement; a number of their claims had
 16 already been dismissed outright and the Court's "how, whether and when"
 17 determination with respect to the (supposed) ambiguity of 6050H substantially
 18 threatened the few claims that remained. See ECF No. 114 at p. 16 (emphasis
 19 original). Indeed, plaintiffs submit that given where the case was, this factor alone
 20 could justify the Court in granting final approval to the settlement.

21 **2. The Risk, Expense, Complexity, And Likely Duration Of Further**
 22 **Litigation Justifies Final Approval – Any Further Delay Would**
 23 **Hurt The Class**

24 Apart from the relative weakness of plaintiffs' case and the complexity of
 25

26
 27 ⁶ See *In re Aremis Soft Corp. Sec. Litig.*, 210 F.R.D. 109, 125 (D.N.J. 2002)
 28 ("Regardless of the strength of case counsel might present at trial, victory in
 litigation is never guaranteed.")

1 issues the case raises (as set forth above, and in the Court’s detailed motion to
2 dismiss orders), there is another factor that strongly favors final approval and which
3 weighed heavily on Class Counsel in their decision to recommend the Settlement.
4 And that is time.

5 While a great many cases hold that early settlements generally benefit all
6 parties and the Court,⁷ this is particularly true in the unique circumstances of this
7 case because of the three-year period for filing amended tax returns – 26 U.S.C. §
8 6511; with each passing year, it becomes impossible to amend from three years
9 before. As it stands, 2016 is the last tax year that still can be amended. If the
10 litigation continued, that year would soon be lost in terms of any possibility for
11 amendment.

12 Class Counsel also had to consider that the Class Members are comprised
13 primarily of financially distressed homeowners. After all, this was the reason many
14 people chose an Option Arm loan in the first instance. The simple fact is that the
15 window of obtaining monetary relief from the IRS through amending prior tax
16 returns was, and is, a vanishing one by statute. It simply would not have been
17 available if the case had proceeded to a later settlement or trial.

18 By concluding this case now, at least Class Members who paid capitalized
19 interest in 2016 (or after) can obtain the *full amount* of their tax deductions (as
20 opposed to being limited to the mere *potential* of seeing a damage award from
21 Nationstar a long time in the future).

22 Unfortunately, because of the immoveable 3-year statute of limitations for
23 amending tax returns imposed by 26 U.S.C. § 6511(a), it was always a virtual
24 certainty that the longer this case was litigated, the worse the end result would be for
25

26 ⁷ *In re M.D.C. Holdings Securities Litigation*, 1990 WL 454747 * 7 (S.D.Cal. 1990)
27 “Early settlements benefit everyone involved in the process and everything that can
28 be done to encourage such settlements—especially in complex class action cases—
should be done.”

1 the class. Plaintiffs' counsel made this point repeatedly, while the case was stayed,
2 in their semi-annual reports to the Court. It was always going to be easier to get
3 Nationstar to issue corrected Forms 1098 than it was going to be to have it agree to
4 pay cash from its own pocket in damages for years where tax returns could no
5 longer be amended.

6 Thus, this factor strongly supports settlement. For if no settlement approval is
7 given, the ability to amend for tax year 2016 will slip away just as it has for tax
8 years 2010-2015.

9 **3. The Risk Of Maintaining Class Action Status Throughout The** 10 **Trial Supports Final Approval**

11 As noted, this Court has already found most of the elements exist for
12 certification of a class. And while plaintiffs are confident that they could
13 demonstrate all of the necessary Rule 23 factors to support certification, Nationstar
14 is certainly not going to concede the issue. Because no class certification motion
15 has yet been filed, plaintiffs do not want to speak for Nationstar as to the arguments
16 it will make in opposing such a motion. However, based on other cases that Class
17 Counsel have litigated, Nationstar may argue, for instance, that because each Class
18 Member's tax situation is unique to them, a class action would be unmanageable.
19 Plaintiffs do not believe this argument has merit based on: (1) the substantial
20 number of cases that hold that differences in damages should not bar a class from
21 being certified and (2) the legion of cases that hold that manageability should be
22 subordinated where, as here, the Class Members would otherwise likely obtain no
23 relief. But, the mere existence of this argument and others Nationstar is sure to
24 come up with, undoubtedly poses a future risk to plaintiffs' case.

25 **4. The Amount Offered In Settlement**

26 As stated, the value of the agreed upon review and issuance of corrected
27 Forms 1098 for years 2016-2019 will not entirely be known as of the time this
28 motion is filed insofar as the aggregate amount of the Forms 1098 to be issued to

1 Claimants for tax years 2016-2019 will not be known until Nationstar completes its
 2 file by file review of the claims that have been filed. Cross Decl., ¶ 3. And, while
 3 Nationstar has agreed to undertake this task as quickly as possible, with the intent to
 4 deliver corrected Forms 1098 for tax year 2016 immediately upon final approval of
 5 the settlement (to allow Class members to timely amend 2016 tax returns), it has no
 6 legal obligation to do this until the Settlement becomes effective. However, we can
 7 turn to the 2016 “fix” and the more than \$10 million that resulted from this
 8 correction as proof that providing corrected Forms 1098 provides real value to the
 9 Class Members. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir.
 10 2002) (where counsel's performance generates benefits beyond a purely cash
 11 settlement, those are entitled to be valued for purposes of a settlement). In terms of
 12 the cash portion of the settlement (made up of the \$50 payments to Class Members
 13 who paid deferred interest to Nationstar prior to 2016), the amount of the payments
 14 will not be known until all claims have been filed and Nationstar has had an
 15 opportunity to review each properly filed payment, which will be \$_____ based
 16 on the number of claims so far.

17 In its Preliminary Approval Order, this Court asked “the Parties to outline
 18 what monetary relief they believe Class Members could possibly have obtained had
 19 they been successful after trial and how the Parties came up with the \$50.00 figure.”
 20 Plaintiffs respond here for themselves alone and not for Nationstar. Were plaintiffs
 21 to prevail in the case, their measure of damages would have been the value of the
 22 deductions which Class Members lost as a result of Nationstar not having reported
 23 her/his/their deferred interest payments. Assuming an average marginal tax rate of
 24 20%, as was done in *Horn*, Class Member damages would average \$0.20 for every
 25 dollar that was not reported by Nationstar. As to the Court’s second question, the
 26 \$50 dollar settlement payment amount was not determined as a function of the
 27 potential damages to each class member, but was an amount plaintiffs and their
 28 counsel agreed to accept: (1) given the significantly weakened litigation position

1 plaintiffs were in following the Court's ruling on their motion to amend/supplement
 2 their complaint vis à vis obtaining additional relief for the Class Members beyond
 3 the relief they had already obtained by virtue of Nationstar's 2016 "fix" and (2) in
 4 order to secure Nationstar's agreement to issue corrected Forms 1098 for Class
 5 Member payments of capitalized interest in tax years 2016 forward. As stated,
 6 Nationstar will provide a more detailed declaration relating to final class
 7 participation numbers prior to the final approval hearing.

8 But the cash amount of the settlement will clearly comprise only a small
 9 portion of the overall value to the Class Members from this case. See Cross
 10 Declaration, ¶ 5(c). But the relatively modest amount of the cash portion of the
 11 settlement is no reason not to approve the Settlement, especially given the
 12 procedural posture of the case at the time the Settlement was entered into as
 13 described above. To the contrary, the value of getting Nationstar to issue corrected
 14 Forms 1098 for 2016-2018 (along with the value previously generated from the
 15 2016 "fix") along with the cash payments is more than sufficient justification for
 16 why the Settlement should be approved.

17 **5. The Extent Of Discovery Completed And The Stage Of The** 18 **Proceedings Favor Approval Of The Settlement.**

19 As noted by the Court in its Preliminary Approval Order, this case has been
 20 pending for a long time. Extensive discovery and motion work have been done by
 21 both sides and the Settlement was negotiated at arms' length. All of this, allowed
 22 plaintiffs "sufficient information to make an informed decision about settlement."
 23 *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir.1998). Negotiations
 24 began with a private mediator, Hon. Ronald Sabraw (Ret.). When that mediation
 25 did not resolve the case, the parties sought the assistance of a Magistrate Judge,
 26 Michael S. Berg. Judge Berg held an in-person settlement conference, at which time
 27 each side submitted substantial settlement briefs. The parties met in person with
 28 Magistrate Berg and after a full day of negotiating, Judge Berg was able to

1 formulate a settlement acceptable to both sides.⁸ Because the Settlement was
 2 reached after arms' length negotiations based upon adequate discovery, this factor
 3 favors final approval.

4 **6. The Experience And View Of Counsel**

5 "When approving class action settlements, the court must give considerable
 6 weight to class counsel's opinions due to counsel's familiarity with the litigation and
 7 its previous experience with class action lawsuits." *Murillo v. Pacific Gas & Elec.*
 8 *Co.*, 2010 WL 2889728 *10 (E.D.Cal. 2010); *Officers for Justice v. Civil Serv.*
 9 *Comm'n of the City & County of S.F.*, 688 F.2d 615, 625 (9th Cir.1982).

10 As noted by the Court in its Preliminary Approval Order, Class Counsel's
 11 declarations reveal that they are very experienced in class action litigation generally,
 12 and specifically including class actions involving complex issues of tax law. Class
 13 Counsel both recommend final approval of this settlement given the Court's prior
 14 rulings. This factor thus favors settlement. Vendler Decl., Brown Decl.

15 **7. The Presence Of A Governmental Participant**

16 There is no governmental participant presently in this case. As such, this
 17 factor really does not apply. However, as noted, there has always been a risk that
 18 the IRS *could* intervene in the case or *could* issue a regulation that would negatively
 19 affect the case. In fact, this Court all but asked it to do so. This uncertainty about
 20 the IRS's position on the reportability of capitalized interest on Forms 1098 also
 21 favors settlement.

22 Further, pursuant to the Class Action Fairness Act ("CAFA"), Nationstar was
 23 obligated to notify the United States Attorney General and certain other federal and
 24 state officials as a condition of obtaining Court approval. Despite this notice, no
 25 state or federal officials, including the IRS, have raised any objection to the

26
 27 ⁸ This is also true as with respect to attorney's fees. The requested award aligns
 28 with the fee discussion held during the judicially supervised settlement after all
 terms of the settlement were negotiated.

1 Settlement even though the settlement specifically contemplates corrections to
2 Forms 1098.

3 “Although CAFA does not create an affirmative duty for either the state or
4 federal officials to take any action in response to a class action settlement, CAFA
5 presumes that, once put on notice, state or federal officials will raise any concerns
6 that they may have during the normal course of the class action settlement
7 procedures.” *Garner*, 2010 WL 1687832 *14. This factor favors approval of the
8 Settlement since the IRS would presumably make its views known if it believed that
9 the corrections to the Forms 1098 that are contemplated herein were improper.

10 **8. The Reaction Of The Class Members To The Proposed Settlement** 11 **Has Been Positive**

12 The positive response of the Class Members to the Settlement is best
13 demonstrated by the fact that out of more than 64,000 notice packets that were sent
14 out, not a single objection has been filed as of the date of the filing of this motion.
15 There are 14 days left for the filing of objections. Keough Decl., ¶ 16. A
16 supplemental declaration of Ms. Keough will be filed after the objection period has
17 expired setting forth the full class participation statistics.

18 “The absence of a large number of objections to a proposed class action
19 settlement raises a strong presumption that the terms of the settlement are favorable
20 to the Class Members.” *Eisen v. Porsche Cars North America, Inc.*, 2014 WL
21 439006 *5 (C.D.Cal. 2014), (quoting *Nat’l Rural Telecomms.*, 221 F.R.D.523, 529
22 (C.D.Cal. 2004). See also *In re Mego Fin. Corp.*, 213 F.3d at 459 (single objection
23 out of a potential class of 5400) and even *Churchill Village, LLC v. Gen. Elec.*, 361
24 F.3d 566 (9th Cir.2004) (500 opt-outs and 45 objections out of approximately
25 90,000 notified Class Members still deemed a positive reaction). Here, with notice
26 going to over 64,000 addresses, that there have been no objectors strongly favors the
27 presumption that the Settlement is favorable to the class.

28 As to opt-outs, the deadline has already passed. Here, only 22 persons timely

1 opted out from the 64,000 class notices sent. Keough, Decl. ¶ 15. This is a
 2 compelling statistic in favoring approval. *In Chun-Hoon v. McKee Foods Corp.*,
 3 716 F.Supp.2d 848, 858 (N.D.Cal. 2010), for instance, even though opt-outs
 4 comprised fully 4.86% of the class, the Court still found a positive response by the
 5 class warranting the presumption of favorability.

6 **VI. CONCLUSION**

7 For all the foregoing reasons, this Court should grant this motion and enter
 8 Final Approval of the Settlement, Award Class Counsel Attorney's Fees in the
 9 amount of \$700,000, as requested in the separately filed Motion for Attorney's Fees,
 10 Award Named Class Representatives an Enhancement as requested in the separately
 11 filed motion and enter judgment thereon.

12 Dated: December 16, 2019

Respectfully submitted,

13 LAW OFFICE OF DAVID J. VENDLER

14 /s/ David J. Vender

15 David J. Vender, Esq.

16 MICHAEL R. BROWN, APC

17 /s/ Michael R. Brown

18 Michael R. Brown

19 Attorneys for Plaintiffs MICHAEL
 20 PEMBERTON and SANDRA COLLINS-
 21 PEMBERTON, and all others similarly
 22 situated
 23
 24
 25
 26
 27
 28